

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEROY ARNOLD FLOYD,

Defendant-Appellee.

UNPUBLISHED

October 28, 2003

No. 240596

Oakland Circuit Court

LC No. 2001-177150-FH

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted from a circuit court order granting defendant's motion for a new trial. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Following a jury trial, defendant was convicted of possession of less than fifty grams of cocaine with intent to deliver. MCL 333.7401(2)(a)(iv). The evidence at trial showed that two undercover officers were investigating Valerie Morris for suspected prostitution. Morris raised the subject of drugs, and the officers indicated that they had \$200 to spend. Morris called her dealer, a man named Leroy, and ordered twenty "dime rocks" of cocaine. Defendant appeared in response to the call and a packet containing twenty separately packaged rocks of cocaine was found under the covers of the bed where he had been sitting.

Prior to sentencing, defendant moved for a new trial on the basis of newly discovered evidence. MCR 2.611(A)(1)(f). He had located Morris, who was willing to testify that the cocaine belonged to her and she had hidden it in the bed. The court accepted her affidavit at face value, found that defendant had used reasonable diligence in trying to locate Morris before trial, and granted the motion.

This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). A new trial may be granted on the basis of newly discovered evidence, *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), although such motions are not favored. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). To warrant a new trial, the defendant must show that the evidence itself, not just its materiality, (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and

producible at trial with reasonable diligence. *People v Bass (On Rehearing)*, 223 Mich App 241, 262; 565 NW2d 897 (1997).

Morris was not a newly discovered witness, but presumably her willingness to admit to the commission of the crime was newly discovered. However, defendant has not shown how and when the discovery was made. See *Swartz v Dahlquist*, 320 Mich 135, 141; 30 NW2d 809 (1948). In determining whether the testimony would have produced a different result, it is appropriate to consider the plausibility of the proposed testimony and compare it to the evidence developed at trial. *People v Miller (After Remand)*, 211 Mich App 30, 48; 535 NW2d 518 (1995). Morris' proposed testimony not only raised many questions, it conflicted with the physical realities of the situation. A police officer searched the bed and remade it before Morris entered the room. She sat on top of the made bed and was placed in handcuffs and removed from the bed before the covers were turned down. She was then taken into the bathroom and kept there for the duration of defendant's visit. There is no explanation as to how she could have placed the drugs under the covers on the one part of the bed to which defendant had access.

Apart from the inherent implausibility of Morris' proposed testimony, defendant must show that she could not, with reasonable diligence, have been produced at trial. What constitutes reasonable diligence depends on the particular facts and circumstances of the case. Cf. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Although defendant and Morris knew one another, his sole attempt to locate her was limited to driving around one evening hoping to spot her on the street. He did not look for her at places where she was known to stay and did not contact any mutual acquaintances who might know her whereabouts. Defendant thus failed to show that Morris could not, with reasonable diligence, have been found and produced at trial. Accordingly, we conclude that the trial court abused its discretion in granting defendant's motion.

Reversed and remanded for sentencing. Jurisdiction is not retained.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello